IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

RCRev..No. 397 of 2005()

RCA.20/2004 of ADDL. DISTRICT COURT-II, KOZHIKODE
RCP.52/2000 of ADDL.M.C.,KOZHIKODE-II
.....

: REVISION PETITIONER/RESPONDENT/RESPONDENT - TENENT

M/S. JANATHA DRUGS,
SAMOOTHIRI COLLEGE NORTH ROAD, KOZHIKODE TALUK,
KASBA AMSOM, DESOM, REP. BY ITS MANAGING DIRECTOR,
U. SATHEESH.

BY ADV. SRI.P.VIJAYA BHANU
SRI.M.GEORGE THOMAS

RESPONDENTS: RESPONDENTS/PETITIONERS - LAND LORDS:

---

1. M/S. MAITHRI CONSTRUCTION,
REP. BY ITS PARTNERS E.SURESH BABU,
S/O. LATE E.KUKTTAPPAN, CONTRACTOR, RESIDING AT
"MAITHRI", KANNANCHERY ROAD, PANNIYANKARA AMSOM,
DESOM, KOZHIKODE TALUK, KOZHIKODE DISTRICT.

2. E. MOHANAN, S/O. LATE E.KUTTAPPAN,
OWN AFFAIRS,RESIDING AT "MAITHRI",KANNANCHERY ROAD
PANNIYANKARA AMSOM, DESOM, KOZHIKODE TALUK,
KOZHIKODE DISTRICT.

3. E. KISHOREKUMAR, S/O.LATE E.KUTTAPPAN,
BUSINESS, RESIDING AT "MAITHRI", KANNANCHERY ROAD,
PANNIYANKARA AMSOM, DESOM, KOZHIKODE TALUK,
KOZHIKODE DISTRICT.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 7/09/2007, THE COURT ON 24/9/2007 PASSED THE FOLLOWING:

ORDER ON IA.NO.2738 OF 2005 IN RCR.NO.397 OF 2005.

DISMISSED.

Sd/- K.Balakrishnan Nair, Judge.

24-9-2007. Sd/- T.R.Ramachandran Nair, Judge.

(true copy)

P.S. TO JUDGE.

kvs/-

K. Balakrishnan Nair &
T.R. Ramachandran Nair, JJ.

**- - - -

the landlord is having other vacant shop rooms in the same building in their possession sufficient for the business of the son of the managing partner and therefore the claim is not sustainable. It was specifically pointed out in the objection that the rooms which were rented out to Mam Distributors have been surrendered to the landlord. They are on the ground floor of the building having numbers 18/1030 and 18/1031 and are suitable for the proposed wholesale business.

3. We notice that the Rent Control Court elaborately considered the oral and documentary evidence while adjudicating the specific issue whether the eviction sought is justified. Relying upon the report of the Commissioner (Ext.C1), the Rent Control Court found that shop room Nos.18/1030 and 18/1031 were entrusted to Saradhi Roadways on 6.7.2001 and the Commissioner had verified the rent receipt also. These shop rooms are situated on the ground floor and are more spacious than the petition schedule shop room. Each shop room is having width of 24 feet and length of 15 ½ feet. The Rent Control Court also found that even though the Commissioner was cross examined, nothing was brought out to discredit the version that the shop room Nos.18/1030 and 18/1031 were entrusted to Saradhi Roadways after the institution of the petition. Finding that the

landlord has suppressed the documents showing entrustment of those rooms, in spite of the admission by P.W.1 that he is in possession of those documents, the Rent Control Court drew adverse inference against the landlord. It was also observed that the landlord has no dispute with respect to the measurement of the shop room Nos.18/1030 and 18/1031 shown by the Commissioner. On the basis of these evidence, the Rent Control Court found that there was no difficulty to start the proposed wholesale business in one of the shop rooms entrusted to the new tenant. On this finding, eviction was disallowed in the light of 1st proviso to Section 11(3) of the Act.. In appeal, t the appellate authority took the view that even if the landlord obtained vacant possession and let out those rooms after the filing of the Rent Control Petition, the fact that those were big rooms and could fetch a monthly rent of Rs.8,000/- are special reasons within the meaning of the first proviso above and therefore ordered eviction.

4. Learned counsel for the petitioner contended that the approach made by the appellate authority is perverse. It is pointed out that the petition schedule room is in the ground floor of the multi-storied building belonging to the landlord firm. In the reply notice itself, the tenant had pointed out that there are vacant rooms available with the landlord which could be utilised for the purpose sought, i.e., room numbers 18/`1032 and

18/1033. It is also pointed out that in the objection filed to the eviction petition , the availability of room Nos.18/1030 and 18/1031 has been clearly pointed out by the tenant and there is nothing in the pleadings of the landlord thereafter to show the special reasons to satisfy the first proviso to Section 11(3) of the Act and nothing was pointed out in the deposition of P.Ws.1 and 2 also as special reasons. It is further argued that merely because of the fact that the rooms vacant are larger than the petition schedule room or that they are fetching an enhanced amount as rent, these are not special reasons available under law to justify the claim for eviction, especially in the absence of any pleadings and evidence.

5. Learned counsel for the landlord submitted that actually the rooms became vacant after the filing of the eviction petition and before the written statement was filed and the fact that they were let out on 6.7.2001 will not defeat the claim of the landlord. It is pointed out that the two rooms which were made available, are bigger in size than the petition schedule room and the landlord is entitled to decide as to how it should be made use of and in this case it was let out on a higher rent of Rs.8,000/- per month whereas the rent for the petition schedule room is only Rs.750/- per month. It is therefore submitted by relying upon the decisions of this court in **Govindan**

Nambiar v. Raghavan (1998 (2) KLT 786) and **Valsan v. Furtal** (2004 (3) KLT 1046) that the view taken by the appellate authority is not perverse. The decision of the Supreme Court in **Savithri Sahay v. Sachidanand Prasad** ((2002) 8 SCC 765) was also relied upon by the learned counsel for the landlord.

6. The crucial question is whether the view taken by the appellate authority is perverse on the admitted and proved facts of the case. Section 11(3) and the first proviso is in the following terms:

> "11(3) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building if he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him:
>
> Provided that the Rent Control Court shall not give any such direction if the landlord has another building of his own in his possession in the same city, town or village except where the Rent Control Court is satisfied that for special reasons, in any particular case it will be just and proper to do so."

Going by the first proviso, if the landlord has another building, then the Rent Control Court shall not give direction to the tenant to vacate the building unless it is satisfied that for special reasons it will be just and proper to do so. Therefore, it is clear that the special reasons should be germane to the issue in question and should not be evasive reasons shown by the landlord. The evidence available in the case has to be examined in

the light of the requirements of the said provision.

7. We will now refer to the pleadings and the evidence on this aspect. The notice to the tenant is dated 1.3.2000 and the reply is dated 11.3.2000. The petition for eviction was filed on 31.5.2000. The objection by the tenant was filed on 13.11.2000. The rooms which became vacant were occupied by Mam distributors, and in the counter statement the tenant had pleaded that they are lying vacant and are suitable for the proposed business. The report of the Commissioner, Ext.C1 shows that they are having the measurement 24 x 15 ½ feet each. The petition schedule room is having the measurement 27' x 18'. The business sought to be started in the petition schedule room relates to wholesale business of national panasonic mixy and rice cooker. It is clear from the reply notice and the counter statement that at the earliest point of time the tenant had raised a contention that vacant rooms are available with the landlord in the same building. It is a case where the landlord has chosen to let out two rooms (18/1030 and 18/1031) immediately after filing of the petition.

8. The Rent Control Court had to judge the effect of same as it is an event which was known to both parties when they went to the trial. Therefore, there was nothing wrong in the Rent Control Court considering the said issue. The landlord in this case is a partnership firm and the

bonafide need put forward that the room is required is for the son of the managing partner who is also a partner. The tenant is also a partnership firm. The Rent Control Court after referring to the oral evidence and the Commissioner's report, found that two rooms were available in the ground floor itself and they have been given on rent to Saradhi Roadways after the institution of the petition. Even though in the deposition P.W.1 in cross examination he wanted to explain away the same, he did not come forward with the documents showing the terms of entrustment and therefore the Rent Control Court has drawn adverse inference as regards the date of entrustment. The Rent Control Court also found that P.W.2 had not pointed out any difficulty to start his business in one of the shop rooms entrusted to Saradhi Roadways. The area of one of the rooms is more or less equal, although the present contention is that these two rooms have been converted to a larger room for letting out to Saradhi Roadways. When the landlord came into possession of rooms which are having more or less equal space in the very same building where the tenant also is occupying a similar room, the question is whether the landlord was justified in letting out the rooms for a higher rent while requiring the eviction of the tenant herein. Even though the tenant cannot dictate as to how the landlord should utilise the room, we find that on the proved facts of the case, the tenant is right in

pointing out that instead of occupying one of the vacant rooms, he has chosen to let out it for higher rent, which is not a special reason at all.

9. We may refer to the legal position laid down in various decisions of the Apex Court and this court in the light of the above factual matrix and the statutory provision herein, viz. the first proviso to Section 11(1) of the Act. It is clear that the burden is on the landlord to plead and prove special reasons when he gets possession of other rooms. The Supreme Court had occasion to examine the question in **M.M. Quasim v. Manohar Lal Sharma and others** (AIR 1981 SC 1113) and **Hasmat Rai and another v. Raghunath Prasad** (AIR 1981 SC 1711). In AIR 1981 SC 1113, eviction was sought on the ground of personal requirement of the landlord while another premises was available for his occupation. The question was examined in the light of the argument that there is an unfettered right for the landlord to re-enter premises of his choice. After examining the position in the light of the object and purposes of the Rent Act, it was held in paragraph 18 as follows:

> "The time honourd notion that the right of re-entry is unfettered and that the owner landlord is the sole Judge of his requirement has been made to yield to the needs of the society which had to enact the Rent Acts specifically devised to curb and fetter the unrestricted right of re-entry and to provide that only on proving some enabling grounds set out in the Rent Act the landlord can re-enter. One such ground is

> of personal requirement of landlord. When examining a case of personal requirement, if it is pointed out that there is some vacant premises with the landlord which he can conveniently occupy, the element of need in his requirement would be absent. To reject this aspect by saying that the landlord has an unfettered right to choose the premises is to negative the very raison d'etre of the Rent Act. Undoubtedly, if it is shown by the tenant that the landlord has some other vacant premises in his possession, that by itself may not be sufficient to negative the landlord's claim but in such a situation the Court would expect the landlord to establish that the premises which is vacant is not suitable for the purpose of his occupation or for the purpose for which he requires the premises in respect of which the action is commenced in the Court. It would, however, be a bald statement unsupported by the Rent Act to say that the landlord has an unfettered right to choose whatever premises he wants and that too irrespective of the fact that he has some vacant premises in possession which he would not occupy and try to seek to remove the tenant. This approach would put a premium on the landlord's greed to throw out tenants paying lower rent in the name of personal occupation and rent out the premises in his possession at the market rate."

In the decision reported in AIR 1981 1711 also, the landlord came into possession of another premises during the pendency of the Second Appeal. It was held that being a subsequent event, the tenant can rely upon that development in resisting the eviction. Their Lordships also examined the question as to the requirement of pleadings by the landlord to resist the argument raised by the tenant. It was observed in paragraph 16; thus:-

> "Section 12(1)(e) specifically provides for a landlord obtaining possession of a building let for residential purposes if he bona fide requires the same for his own use and occupation. But there is an additional condition he must fulfill namely he must further show that he has no other reasonably suitable residential accommodation of

> his own in his occupation in the city or town concerned. Utter silence of the landlord on this point would be a compelling circumstance for the Court not to go in search for some imaginary requirement of the landlord of accommodation for his residence. In the context of these facts the Trial Court and the first Appellate Court committed a manifest error apparent on the record by upholding the plaintiff's case by awarding possession also on the ground neither pleaded nor suggested the landlord must have been quite aware that he cannot obtain possession of any accommodation for his residence."

10. It is therefore clear that the landlord has got a duty to explain the special reasons for not choosing to occupy the premises he has come into possession. We are adverting to the above in the light of the fact that when in a case where the first proviso is attracted, eviction can be ordered only if the court is satisfied that there are special reasons enabling the landlord not to choose to occupy the vacant premises. Herein, as we have already noticed, in the objections the tenant has specifically pleaded the availability of the rooms 18/1030 and 18/1031. The landlord has not chosen to amend the Rent Control Petition or to file a replication/reply in the matter explaining any of the circumstances which justify his preference to the tenanted premises here and did not point out any special reasons for not occupying the vacant premises. In the proof of affidavit also, he has not pointed out any special reasons for not occupying either of the rooms 18/1030 or 18/1031. When he was confronted with the above in the cross

examination, the answers were evasive. He admitted that Saradhi Roadways is occupying rooms in the ground floor, but pleaded ignorance about their numbers. He also admitted that before Saradhi Roadways were put in possession, the tenant was Mam Distributors. Lower down he admitted that Saradhi Roadways is occupying room Nos.18/1030 and 18/1031. To a specific question whether he is in possession of rent deed with Saradhi Roadways, the answer is "may be available. They are occupying based on a mortgage." It was specifically asked whether they are occupying the premises either on rental basis or by way of a mortgage and the answer is "it is a mortgage". To a specific question as to what is the amount of rent paid by Saradhi Roadways, the answer is "it is not rent and during month end amount is being received from Saradhi Roadways" and he can state the exact amount only by verifying the accounts. Then as regards the details of the rooms, according to him, even though it may appear as a single one, there are four rooms with Saradhi Roadways. Thus, even in the deposition, he has not stated any special reasons as to why the vacant rooms were not occupied and as to the suitability of the rooms. P.W.2 is the son who is a partner and for whose occupation the premises are sought to be evicted. In the proof affidavit of P.W.2 also, no special reasons have been pointed out. The only statement in chief examination is that

neither the partnership nor other partners individually are not in possession of any suitable rooms for conducting the business. This is not a special reason as envisaged in the first proviso to Section 11(1) of the Act. In his cross examination he feigned ignorance about the date on which Saradhi Roadways was entrusted with the vacant premises, the amount being received from them and even about the number of the rooms occupied by them, lower down he admitted that the monthly rent being paid by them is Rs.8,000/-. He admitted that they were put in possession after the filing of the eviction petition. We have referred to the portion of the oral evidence, in view of the argument that the view taken by the Appellate Authority is not supported by the pleadings or evidence of the landlord.

11. Learned counsel for the respondents invited our attention to the decision of the Supreme Court reported in **Savitri Sahay v. Sachidanand Prasad** ((2002) 8 SCC 765), to contend for the position that it is the choice of the landlord that is material. The facts of the case show that their Lordships took that view taking into consideration Explanation II to Section 11(1) of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982. The same is reproduced below:

"Explanation II.-- Where there are two or more premises let out by

> the landlord, it will be for the landlord to choose which one would be preferable to him and the tenant or tenants shall not be allowed to question such preference."

After referring to the said provision, Their Lordships of the Supreme Court observed in the following terms:

> "Thus it is to be seen that, under the said Act, if there are two or more premises the landlord could choose which one would be preferable to her and the tenant cannot question such preference."

Their Lordships were of the view that the said Explanation II to Section 11 (1)(c) permitted the landlord to ignore other premises and to prefer a particular premise and the landlord having made a preference, cannot be forced occupy other premises which may become available. Here, the question is totally different and the provisions are not similar also. The reliance placed on the said decision is therefore of no help to the respondent. In the decision reported in **Govindan Nambiar v. Raghavan (**1998 (2) KLT 786 (SC) the facts show that the landlord got vacant possession of another premises situated adjacent to the petition schedule building. A commission was allowed to be taken out by the appellate

authority to conduct spot inspection of the premises and to report whether it was or was not suitable for the proposed business. The appellate authority after considering the report of the Commissioner, concluded that the available building is not one fit for the grocery trade proposed by the landlord. This court set aside the same after finding that the draw backs found in the premises which was vacated can be remedied by the landlord by providing a roof ceiling. The acceptability of this reasoning of the Division Bench was considered by the Apex Court. It was held in paragraph 5 that "requirement of law is that the building which has been vacated should be of such a character which would meet the requirements of the landlord and not that the building which fell vacant could meet his requirements after reconstruction/renovation etc." In view of the above, their Lordships held that the reasoning adopted by this court is not correct. The situation here is not similar.

12. The other decision relied upon by the learned counsel for the respondent is **Valsan v. Furtal** (2004 (3) KLT 1046). The facts of the case show that during the pendency of the eviction proceedings, the landlord came into possession of an area of about 500 sq. ft. vacated by another tenant which was also in the same compound, only 8 meters away. The tenant raised a question that because of the subsequent event, eviction

cannot be ordered. In reply to the affidavit filed by the tenant, the landlord pointed out special reasons for not occupying the above space. It was pointed out by the landlord that the portion which was vacated, is required for their residence and after considering the above special reasons, the Division Bench observed as follows:

> "We may point out, so far as this case is concerned, though the landlord has come into possession of another premises, that is, the ground floor of building No.37/1356, facts would indicate that the premises is bona fide required for the purpose of his own residence. Tenanted portion of the building is bonafide required for the requirement of the landlord. Area of the first floor of the residential building is 1,300 sq. ft. Ground floor also has an area of 1,000 sq. ft. Landlord has stated that the area is bona fide required for his residential purpose which itself is a special reason. The premises occupied by P.A. George &Co. is on the ground floor of the landlord's residential house. The landlord requires the entire premises for his residence and hence the need in our view is bona fide."

The situation herein is therefore not similar. In fact, the above decision was relied upon by the appellate authority to hold in favour of the landlord. The fact situation therein is totally different and we notice that a special reason was pointed out by the landlord, the sufficiency of which was accepted by the Division Bench.

13. As we have noticed earlier, the landlord did not indicate in the deposition any special reasons for not occupying room Nos.18/1030 and 18/1031. The answers given in the cross examination were evasive also.

The Rent Control Court after considering the evidence in detail, found that the landlord had suppressed the facts relating to the creation of tenancy in respect of those rooms, from the court which necessitates drawing an adverse inference against the landlord. It was also found that the space available in either of the shop rooms is more or less the same and therefore there was no difficulty for P.W.2 to start the proposed business in one of the shop rooms. The measurement of the rooms reported by the Commissioner also was referred to by the Rent Control Court, which have already been noticed by us above. The reason that the rooms are larger and therefore they cannot occupy it, appears to be not correct. No evidence on those aspects have been adduced by the landlord. The contention raised is that they have chosen to join the two rooms before letting it out to Saradhi Roadways. Even that will not show that it is four times larger than the schedule rooms, as now argued. Apart from that, the further argument is that the rooms jointly fetch a monthly rent of Rs.8,000/- and compared to the rent of the scheduled premises of Rs.750/- per month, the landlord has chosen to let out the same for a higher rent. That the landlord will get more rent if those premises are rented out, rather than occupying one of the rooms for the business proposed to be started, cannot be a special reason for the purpose of the 1st proviso. It prohibits the power of the court to order

eviction unless acceptable special reasons exist. Further, that point has never been spoken to either by P.W.1 or by P.W.2 in their deposition also. It appears that the same has only been raised at the time of argument. We find that unless the landlord either in the pleadings or in the evidence explains the special reasons, the court will not be able to assess the same in the right perspective.

14. The appellate authority noticed that in the affidavit filed by the landlord to set aside the Commission report, there is an assertion that the space occupied by Saradhi Roadways was not necessary for the business of his son. A reading of the affidavit shows that the averment is that the room is a big one than the petition scheduled one and is not suitable. But the attempt was only to dispute the measurements reported by the Commissioner. Subsequently, no evidence was adduced in support of this affidavit which was filed to set aside the Commissioner's report. Therefore, we hold that no reliance could have been placed on it and the view taken by the appellate authority is totally perverse.

15. Thus it is a case where the landlord failed to establish cogent and acceptable special reasons under the 1st proviso to Section 11(3) of the Act. The appellate authority was not justified in reversing the order passed by the Rent Control Court, for all the reasons pointed out above.

Therefore, we allow the Revision Petition. The judgment of the Rent Control Appellate Authority is set aside. The petition for eviction is dismissed. No costs.

(K. Balakrishnan Nair, Judge.)

(T.R. Ramachandran Nair, Judge.)

kav/